Retlaw Broadcasting Co., a subsidiary of Retlaw Enterprises, Inc., d/b/a KMST-TV, Channel 46 *and* American Federation of Television and Radio Artists, San Francisco Local. Case 32–CA–10271

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 6, 1989, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by suspending its annual employee evaluations after the Union had filed a representation petition. We find merit to the Respondent's exceptions.

The Respondent operates a television station in Monterey, California. As more fully described by the judge, the Respondent annually evaluated its employees' performance and wages on their employment anniversary date.[1] On February 28, 1989, the Union filed a representation petition, which the Respondent received in the first week of March. The Respondent's vice president, Ben Tucker, contacted the Respondent's attorney, who advised Tucker to suspend the evaluations because an employer must ''be very careful, because anything you do can be construed to be a movement to buy votes.'' On Tucker's instruction, General Manager Dick Drilling suspended the evaluations in early March. They had not been reinstituted as of the hearing in August 1989. As a result of the suspension, a substantial number of employees who would have been evaluated were not.

Representatives of the Respondent discussed the suspension with employees on six occasions, five of which were before the election held on May 21 and 22, 1989. All the Respondent's discussions of the evaluations but the first were in response to employee questions. During the first week of April, the station's chief engineer, Roy Dasher, met with two employees. He told them that he had done their annual evaluations but that no action would be taken on them because of the union situation. Dasher explained that NLRB regulations prohibited the Respondent from doing anything that could be construed as a bribe to encourage employees not to vote for the Union.

On April 6, Vice President Tucker spoke to the station's production employees about the Union's petition and then opened the meeting for questions. An employee, Scott Thompson, asked if the employees would receive the raises that earlier had been promised to them. Tucker responded that the Respondent's attorney had advised him that because of the organizational campaign and the upcoming election the Respondent could not give pay raises because it might look like it was trying to bribe the employees to vote against union representation. Tucker added that as soon as the Respondent was advised it could reinstate the evaluation policy for merit raises, it would, but would ''wait until [it] had clearance and everything was taken care of.''

In an April meeting with a group of production employees, General Manager Drilling was asked what was going to happen with the employees' evaluations and wage reviews. Drilling replied that, on the advice of the Respondent's attorney, he was unable to continue evaluating employees for raises because it would give the appearance of trying to buy votes, but that when the ''lawyer told [him] that it was okay'' to reinstate the policy he would do so.

In May, Drilling met with the Respondent's production employees and was asked if the policy of reviews and raises would be affected by whether the Union won or lost the upcoming election. Drilling answered ''that would not have an effect on us continuing with our evaluating process.'' In a different meeting in May with the news department employees, in response to a question Drilling told the employees, ''whether or not we had a union at KMST, that we would continue the evaluation process that we now have with evaluating the employees and their performance on the job.''[2]

The Union won the election held May 21 and 22 and the Respondent filed objections. On July 13, the Regional Director found the Respondent's objections to be without merit and certified the Union. The Respondent filed a request for review of the Regional Director's decision and certification with the Board.[3]

On July 18, Drilling met with all the Respondent's employees, and advised them that, as the election was over, things should return to normal and that he did not want the employees to harbor any ill-will toward the Respondent. Employee Thompson asked if the employees would be getting their raises. Drilling said that the Union and the Respondent had appeals pending be-

[1] Pursuant to the annual evaluations, between 85 and 90 percent of the employees received wage increases.

[2] During the election campaign the Union's literature criticized the Respondent's suspension of the evaluations. Such criticism was the subject of one of the Respondent's objections to the election.

[3] The Respondent's request for review was pending at the time of the hearing in this unfair labor practice case. On December 12, 1989, the Board denied the Respondent's request for review in an unpublished decision.

fore the Board and that he had been advised by the Respondent's attorney that to grant raises would give the appearance of trying to buy votes and influence employees' decisions. He further said that as soon as he learned from the attorney that it was legal to give raises he would, but not until then.[4]

Contrary to the judge, we find that the Respondent's conduct, viewed as a whole, did not violate Section 8(a)(1). In *Atlantic Forest Products*, 282 NLRB 855 (1987), the Board reiterated the law on this issue:

> It is well established that an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene. . . . An exception to this rule, however, is that an employer may postpone such a wage or benefit adjustment so long as it ''[makes] clear'' to employees that the adjustment would occur whether or not they select a union, and that the ''sole purpose'' of the adjustment's postponement is to avoid the appearance of influencing the election's outcome. [282 NLRB at 858.]

The Respondent made no attempt to capitalize on the suspension of the evaluations to discourage employees' union activity. It did not post a notice or generally publicize that it had suspended the evaluation-review program. Rather, in five of the six occasions the suspension was discussed, discussion of the subject was initiated and framed by an employee question.[5] When it did discuss the suspension, the Respondent did not say or imply to its employees that the suspension was in retaliation for their support of the Union. Rather, the Respondent explained to the employees that the reason it suspended the evaluation-reviews was to avoid the appearance of attempting to influence their votes in the election. General Manager Drilling told the employees that whether or not the Union won the representation election, the Respondent would continue its evaluation program. Having made plain that its suspension of the evaluation-review program was based on its attorney's advice that to continue it could be considered unlawful interference in the election, the Respondent also made clear that it would reinstate the program as soon as it was advised that it was legal to do so.

After the election, which the Union won, the Respondent filed objections. The objections were ultimately overruled. While they were pending before the Board, however, the possibility existed that the election would be set aside and a new one ordered. In the July 18 meeting with all the employees, an employee asked if they would get their raises because the election was over. Thus, while General Manager Drilling's comments at the July 18 employee meeting were made after the election, they came at the time the Employer's objections were pending. In response to an employee's question Drilling repeated that to grant raises could give the appearance of trying to buy votes and influence the employees' decisions. Drilling further stated that as soon as he learned from the Respondent's attorney that it was legal to give the raises he would do so, but not until then. We find that the Respondent's conduct was permissible under *Atlantic Forest Products*, supra. The Respondent ''made clear'' to its employees that evaluations would continue whether or not the employees selected the Union and that the ''sole purpose'' of suspending evaluations was to avoid the appearance of influencing the outcome of the election. *Atlantic Forest Products*, supra, 282 NLRB at 858.

The judge identified four reasons for concluding that the Respondent's suspension of evaluations was not permitted under *Atlantic Forest Products*.[6] He found that the Respondent was ''vague and evasive'' about when it would reinstate the evaluation-review programs. As noted, however, Drilling explained to employees that the Respondent would reinstate the evaluations as soon as it was legal for it to do so. The judge, next, relied on the Respondent's failure to assure the employees that when it reinstated the evaluations and wage reviews any wage increases would be awarded retroactively. Although this is a factor, it is not determinative.[7] Third, the judge relied on the fact that the Respondent did not reinstate the evaluations after the election. As noted, however, the Respondent was pursuing its objections to the election. Had the Board found the Respondent's election objections to be meritorious, a second election would have been directed, making the Respondent's intervening conduct subject to ''critical-period'' scrutiny. Thus, it was entirely consistent for the Respondent to defer the evaluations until the merits of its objections were finally determined. Finally, the judge relied on the fact that

[4] On July 14, employee Kelly Nigro asked Production Manager Mark Walker whether he would receive an evaluation that the two had agreed would occur in April (it was not yet time for Nigro's employment anniversary evaluation). Walker responded that General Manager Drilling had frozen everything, that there was a wage freeze. Neither the Union nor the election was mentioned. On the evidence before us, we are unable to conclude that Walker's statement to Nigro about a ''wage freeze'' affecting a special-situation evaluation of Nigro even related to the allegedly unlawful suspension of employment anniversary evaluations.

[5] On the other occasion, the chief engineer told two employees that, although their evaluations had been completed, no wage review would occur because the Respondent had suspended the evaluations in order to avoid appearing to bribe them not to vote for the Union.

[6] We do not agree with any implication in the judge's decision that *Village Thrift Store*, 272 NLRB 572 (1984), overruled or limited the *Uarco Inc*., 169 NLRB 1153 (1968), line of cases, of which *Atlantic Forest Products*, supra, is representative.

[7] See *Cutter Laboratories*, 221 NLRB 161, 169 (1975), in which the judge relied on the respondent's preelection assurance of retroactivity as one factor in considering whether election interference had occurred and, *Sugardale Foods*, 221 NLRB 1228 (1975), in which no election interference was found notwithstanding that the employer made no preelection assurance regarding retroactivity.

the Respondent should have known that neither the General Counsel nor the Union would object to the reinstatement of the evaluations. For the reasons just stated, we believe that such reliance is misplaced. Further, while it is true that the Union's election campaign literature found fault with the Respondent's suspension of the evaluations, the Union might also have found fault with a reinstitution of the evaluations prior to the election. As the Respondent argues, it is possible that, for campaign purposes, the Union would have found fault with any course of action the Respondent took. In these circumstances, we do not think the Respondent was required to speculate concerning the Union's position on reinstitution of the evaluation program prior to the election.

As fully discussed above, we find that the Respondent's conduct was consistent with conduct found lawful under the *Uarco - Atlantic Forest Products* line of cases. The dissent agrees that the Respondent's conduct from early March to May 19 was lawful. It would find, however, that once the Regional Director issued the May 19 complaint, which alleged that the same March-to-May conduct was *un*lawful, it was incumbent upon the Respondent to conform to the Regional Director's reading of the law, a reading which we unanimously reject. Ironically, the dissent characterizes the effect of the complaint as ''reliably'' informing the Respondent that its lawful conduct was unlawful. We cannot agree with the dissent's logic, which would find an unfair labor practice based on a respondent's failure to change its lawful conduct.

A complaint alleges unfair labor practices; it does not, itself, find them. Not all complaint allegations are ultimately sustained or even litigated; allegations may be withdrawn. Moreover, even assuming that the issuance of the complaint represented the Regional Director's ''final''[8] view of whether the Respondent's conduct was an unfair labor practice, it did not resolve the representation case. Had the Respondent changed its conduct in response to the complaint, it still would be subject to a union objection in the representation case that reinstituting the evaluations before the election interfered with employee free choice. Unlike the Regional Director's determination to issue a complaint in the ''unfair labor practice'' case, his interpretation in the ''representation'' case would be subject to review by the Board. In cases of this type, we do not agree that it would further the Act's objectives to require an employer to conform to a complaint's view of the law.

We also note that implementation of the dissent's view of the law could create havoc in the election process. Although the dissent does not specify how the Respondent could have complied with the dissent's view of the law, it seems apparent that the Respondent would have had to reverse its suspension of employee evaluations after May 19. The complaint issued 2 days before the first day of balloting in the election. The performance appraisals required the department head to evaluate various factors relating to the employee being evaluated, including performance during the past year, a comparison of the salaries of other employees performing comparable work, and the amount of money available in the budget. After the department head completed this task, the appraisal and any pay raise recommendation was then presented to the Respondent's general manager for review and action. The evidence indicates that more than a few employees' anniversary dates had passed by May 19. Thus, any attempt to reinstitute the evaluations before the election would likely have been attended by accusations of unlawful or objectionable behavior. The probable result would have been confusion among the employees in the last 2 days before the election. We do not think it good policy to encourage such confusion and potential for interference with the employees' free choice in an election.

We do not find that the Respondent's conduct, considered as a whole, violated the Act, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS, dissenting.

My colleagues find that the Respondent acted lawfully when, during a union organizing campaign and the pendency of election objections, it suspended its policy of annually evaluating employees on their employment anniversary dates and granting wage increases based on those evaluations. They reason that, because the Respondent did not attempt to capitalize on the suspension of the evaluations to discourage union activity, but instead explained that it had suspended the evaluations to avoid giving the appearance of attempting to influence the employees' votes in the election, and that the evaluations would be reinstated after the election regardless of the outcome, its conduct, considered as a whole, was not unlawful. For the following reasons, I disagree.

Board has long held that an employer faced with a union organizing campaign is required to proceed with an expected wage or benefit increase as though the union were not on the scene.[1] The Board has carved out a limited exception to this rule, however, permitting such an employer to defer a planned wage or benefit increase as long as the employer makes clear to employees that the increase will occur whether or not

[8] We note that it is not unheard of for a Regional Director to reconsider disposition of a case in light of a motion for reconsideration, an appeal to the General Counsel, or for a Regional Director to make mutually inconsistent complaint allegations and allow the trier of fact to determine which fact existed or was unlawful.

[1] *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

they select the union, and that the sole purpose of the postponement is to avoid the appearance of influencing the outcome of the election. Id. The rationale underlying that exception is that without it an employer faced with a union organizing campaign would court unfair labor practice allegations whether it granted a wage increase or withheld it.[2] The Board has developed the exception so that employers will be able to avoid this kind of ''damned if you do, damned if you don't'' choice.[3]

Although the Respondent informed employees that the evaluations had been suspended only to avoid the appearance of interfering with the election and that they would be reinstated after the election irrespective of the result, I nevertheless find that it acted unlawfully. I reach this result because, in my view, the rationale for the exception on which the Respondent relies ceased to exist on May 19, 1989, when the complaint issued, alleging that the suspension of the evaluations and raises was unlawful. Before that date, the Respondent could legitimately have feared that proceeding with its established policy would lead to the filing of unfair labor practice charges. After May 19, however, there could have been no such legitimate doubt. At that point, the General Counsel's position was clear and known to the Respondent: its suspension of the evaluations and raises was allegedly an unfair labor practice. Even so, the Respondent persisted in telling employees the exact opposite: that it could not lawfully evaluate employees and grant raises based on the evaluations.[4] The Respondent's adherence to a position which, it had been reliably informed, was unlawful should, in my opinion, preclude the Board from finding that the Respondent was simply acting in a ''good faith effort to conform to the requirements of the law.''[5] Under these circumstances, the Respondent's adherence to its position after May 19 is revealed as simply a cynical attempt to foster antiunion sentiments by tacitly blaming the Union and the union organizing effort for the employees' not being evaluated and receiving raises according to the Respondent's established practice.

Notwithstanding all the foregoing, however, my colleagues in the majority find no violation here. The gist of their position seems to be that, because the Respondent's conduct between March and May 19 was lawful, it should not have had to modify that conduct merely because the Regional Director issued a complaint alleging that conduct to be unlawful. That reasoning, it seems to me, ignores the premise that underlies the exception that has been created for this class of cases (and that the majority do not appear to dispute)—which is to afford employers in positions similar to the Respondent's a fighting chance to avoid having charges filed against them. When the Respondent's gambit failed, the predicate for the exception no longer existed. It makes no sense to permit the Respondent to continue to follow a course of action designed to avoid the filing of charges—and held to be lawful only because it may have that effect—*after* a charge has been filed (and especially after a complaint, based on that charge, has issued). Thus, the majority inaccurately characterizes my position as requiring the Respondent to change its lawful conduct; my position is that once the predicate for that conduct was removed the conduct was no longer lawful.

I am not persuaded by my colleagues' concerns that the Respondent, by reinstating the evaluations and wage increases, might have courted legal liability had the Regional Director changed his position (an unlikely possibility, given that the Respondent did not request reconsideration or file an appeal to the General Counsel) or had the Union filed objections in the representation case. Nor do I share their view that the Respondent would have created havoc in the election process by so doing. I concede that had the Respondent changed its behavior and reinstated its established policy without consulting the Union or the Regional Director first it might have risked having additional charges or election objections filed. In that event, of course, the Union would lay itself open to the accusation that, indeed, it would have objected to the Respondent's conduct no matter what. It is also unlikely that the Regional Director, having issued a complaint alleging that the Respondent had unlawfully *suspended* annual evaluations and wage increases, then would have found merit in a contention that the Respondent interfered with the election by *reinstating* those evaluations and wage increases.

Moreover, in raising those concerns, my colleagues evidently overlook the fact that the Respondent, once it became aware of the Union's position and certainly when it learned that the Regional Director agreed with

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[2] See, e.g., *Village Thrift Store*, 272 NLRB 572 (1984).

[3] Id.

[4] The record reveals that General Manager Dick Drilling made such a statement at a meeting of all employees on July 18. Drilling also stated that the Respondent's attorneys had advised against giving raises. Reliance on the advice of counsel, however, is not a defense to the allegations here. *G. C. Murphy Co.*, 223 NLRB 604, 607 (1976), enfd. 550 F.2d 1004 (4th Cir. 1977).

[5] *NLRB v. Dorn's Transportation Co.*, 405 F.2d 706, 715 (2d Cir. 1969); *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1130 (9th Cir. 1978).

In *G. C. Murphy Co.*, supra, the petitioning union had informed the employer that the union would not file unfair labor practice charges if the employer granted wage increases during the organizing campaign. The employer, however, did not grant wage increases. Instead, it portrayed the union as having attempted to induce the employer to break the law. The administrative law judge, in an opinion adopted by the Board and affirmed by the court of appeals, found the employer's actions unlawful. He noted that the union's assurance ''plainly relieved the Respondent of any fear that it might be violating the Act by proceeding with the merit reviews in accordance with its established practice.'' 223 NLRB at 607. The court, in affirming, also observed that, under the circumstances, ''the employer had no ground to fear that granting wage increases at that time would provoke an unfair labor practice charge.'' 550 F.2d at 1005. Here, a fortiori, where the Respondent persisted in suspending its established policy of periodic evaluations and raises, on the ground that any other course of action might be unlawful, even after it knew with absolute certainty that the *General Counsel* considered its actions unlawful, there are ample grounds for finding a violation.

the Union, was not obliged to pretend that it was being held incommunicado. Instead, it could have explained its position to the Union and the Regional Director and offered to reinstate the evaluations and wage increases if the Union agreed to withdraw its charge and not to file election objections. Had the Union agreed, the Respondent could have announced that the evaluations and wage increases would go through; had the Union refused to agree, the Respondent could have continued to withhold the evaluations and increases (and could have informed the employees that it was doing so because of the Union's opposition to its doing business as usual).[6] Having offered to reinstate its normal policy, the Respondent would have been safe in doing so if the Union and the Regional Director had agreed, and should not have been found to have engaged in unlawful or objectionable conduct by continuing to withhold the evaluations and wage increases if the Union and the Regional Director had opposed giving them.

For the foregoing reasons, I find that the Respondent was not justified in maintaining its position after the complaint issued, and I find that in doing so it violated Section 8(a)(1) of the Act as alleged.

[6] See *Rosauer's Supermarkets*, 300 NLRB 709 (1990). In that case, the employer informed the petitioning union that it planned to implement a new wage program and was told that the union probably would file a charge if the program was implemented while the election was pending. The Board found that the employer acted lawfully in postponing the implementation of the program and in announcing to its employees the reason for the postponement. Cf. *G. C. Murphy Co*., supra.

Gary M. Connaughton, Esq., for the General Counsel.
Thomas E. Campagne and *Sarah A. Wolfe, Esqs*., for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAIPIRO, Administrative Law Judge. This proceeding in which a hearing was held on August 23 and 24, 1989, is based on an unfair labor practice charge filed April 6, 1989, by American Federation of Television and Radio Artists, San Francisco Local (the Union), and on a complaint issued May 19, 1989, on behalf of the General Counsel of the National Labor Relations Board (the Board), by the Regional Director of the Board for Region 32, alleging that Retlaw Broadcasting Co., a subsidiary of Retlaw Enterprises, Inc., d/b/a KMST-TV, Channel 46 (Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act), when ''commencing on or about March 27, 1989, Respondent ceased its customary practice of annually evaluating employees and granting employees annual wage increases based on such evaluations.''[1] Respondent filed a timely answer to the complaint in which it denied the commission of the alleged unfair labor practices.[2]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

The Evidence

Respondent, a California corporation, owns and operates television station KMST-TV, Channel 46, located in Monterey, California. Ben Tucker is the executive vice president of Respondent's parent corporation. Dick Drilling, KMST's general manager, reports to Tucker. Mark Walker, KMST's production manager, and Roy Dasher, the station's chief engineer and the head of the engineering department, report to Drilling.

During the time material KMST's employees were not represented by a labor organization. On February 28, 1989,[3] in Case 32–RC–2870, the Union filed a petition with the Board's Regional Office seeking a representation election in a bargaining unit of KMST's operations and programming department employees, news department employees, and three traffic assistant/clerical employees employed in the sales department. During the latter part of March a hearing was conducted by the Board's Regional Director in Case 32–RC–2870 and thereafter, pursuant to the Regional Director's April 21 Decision and Direction of Election, an election was conducted by the Regional Director on May 21–22 in a unit of KMST's news department and operations and programming department employees. A majority of the eligible voters voted in favor of union representation. Respondent filed objections to the election which the Board's Regional Director, in his supplemental decision issued in Case 32–RC–2870 on July 13, 1989, found were without merit, and certified the Union as the voting unit employees' exclusive collective-bargaining representative. Respondent's request for review of the Regional Director's supplemental decision and certification of the Union was pending before the Board as of the date of the hearing in this proceeding.

Respondent has owned and operated television station KMST since 1979 and for the past several years has maintained a policy of evaluating the work performances of the station's employees on or about their anniversary dates, for the purpose of determining whether to grant the employees' annual wage increases on or about their employment anniversary dates. This policy works as follows. On or about an employee's employment anniversary date the employee's department head evaluates his or her job performance for the purpose of deciding whether to grant the employee a pay raise effective on or about the employee's anniversary date

[1] The complaint in this case was consolidated for hearing with complaints in Cases 32–CA–10352 and 32–CA–10412, charging Respondent with other violations of Sec. 8(a)(1) and (3) of the Act. However, at the start of the hearing herein, with my approval, all the parties involved entered into an agreement settling all of the unfair labor practices alleged in Cases 32–CA–10352 and 32–CA–10412, as well as other violations of Sec. 8(a)(1) and (3) alleged in the instant case. The settlement agreement resulted in the General Counsel's withdrawal of the complaints issued in Cases 32–CA–10352 and 32–CA–10412, and the withdrawal of the other unfair labor practice allegations in the instant case encompassed by the settlement agreement.

[2] In its answer to the complaint Respondent admits it meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(2) and (7) of the Act. Also Respondent admits in its answer that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] All dates hereinafter, unless otherwise specified, refer to the year 1989.

and, if so, the amount of the pay raise. The department head, in making these decisions, considers the employee's experience, job performance, the salary of other employees within the department doing comparable work, and the amount of money budgeted by Respondent for salaries in that department. After deciding whether the employee should receive a pay raise, and if so, deciding on the amount of the raise, the department head then goes to the station's general manager with his recommendation. The general manager agrees with the recommendation of the department head, at least 70 percent of the times. Pursuant to the aforesaid policy, between 85 and 90 percent of the station's employees have received wage increases each year on or about their anniversary dates. It is undisputed that employees familiar with the Company's policies realize that on or about their anniversary dates they will be evaluated and if they have been performing their jobs satisfactorily and if economic conditions warrant, that they should reasonably expect a pay raise as the result of the evaluation (Tr. 145).

During the first week of March, on receipt of the Union's representation petition filed in Case 32–RC–2870, Executive Vice President Tucker told KMST's general manager, Drilling, to suspend Respondent's policy of annually evaluating employees job performances and granting them merit wage increases in conjunction with the evaluations, and instructed him not to resume this policy until Tucker had been notified by Respondent's lawyer that the station could legally reinstate the policy. Pursuant to those instructions all such evaluations have been discontinued and as a consequence, since early in March, no annual anniversary date merit pay raises have been granted to the station's employees. It is undisputed that from early March through the date of the hearing in the instant case, August 24, that during the normal course of business a substantial number of employees would have had their anniversary date performance evaluations and as a result most of those employees would have received pay raises ranging from 3 to 10 percent.

Tucker testified Respondent's reason for suspending its policy of evaluating employees and granting them annual merit wage increases on or about their employment anniversary dates was that when Respondent received notification from the Board ''that there was going to be an election or there was an organizing movement at the station,'' that Respondent consulted its lawyer and, among other things, asked its lawyer whether it should suspend its policy of evaluating employees to grant them annual pay raises on or about their anniversary dates, and that the lawyer recommended that it suspend this policy because, the lawyer explained, during the period before an election Respondent must ''be very careful, because anything you do can be construed to be a movement to buy votes'' and informed Respondent that ''the laws are very unclear on that.'' Tucker testified that it was because of this advice that Respondent ''early in March'' decided to suspend its policy of evaluating employees to grant the annual merit pay raises on or about their employment anniversary dates. Tucker also testified that when Respondent is advised by its lawyer that there are no longer any legal problems in doing so, Respondent will resume this policy, but does not know whether, when it decides to resume the policy, it will grant the employees' wage increases retroactively to the employees' employment anniversary dates.

After deciding in early March to suspend its policy of annually evaluating employees for the purpose of granting them a merit pay raise on or about their employment anniversary dates, Respondent notified the employees about this decision. The evidence of the explanations Respondent gave to the employees for its decision is set forth hereinafter.

During the first week of April the head of the station's engineering department, Roy Dasher, met with two of the employees employed in his department, Catherine Wilson and Kent Tegtmeier, and, as Wilson testified, this is what occurred[4]

> Roy [Dasher] came in and he had a yellow legal pad. And he said he had a statement to read to us, which he wouldn't allow us to see But he read it aloud to us both, saying that as was customary, he had completed our evaluations, as was customary at that time of year, and had recommended us for pay increases. And that he had submitted those recommendations and evaluations to Dick Drilling, and was told that because of the union situation, there would be no action taken until the union matter was settled. And he said that this was because of the NLRB regulations that they cannot do anything that could be construed as a bribe to encourage employees not to vote for the union.

On April 6 Executive Vice President Tucker met with KMST's production employees. He spoke to the employees about the Union's petition for a representation election and then opened the meeting for employees' questions Scott Thompson, an engineering department employee, informed Tucker that he and other employees in that department had been evaluated by department head Dasher and Dasher had stated they would be receiving pay raises.[5] Thompson asked Tucker if the employees were going to receive the pay raises Dasher had promised them.[6] Tucker responded by stating he was unaware Dasher had promised the employees pay raises, but Respondent's lawyer had advised him that because of the Union's organizational campaign and the fact that there was going to be an NLRB-conducted election, that Respondent could not give pay raises because it might look like it was trying to bribe the employees to get them to vote against union representation. Tucker also explained to the employees that as soon as Respondent was advised it could reinstate its previous policy of evaluating employees for merit wage increases that it would do so, but would wait ''until [it] had clearance and everything was taken care of'' before doing this.[7]

In April Station Manager Drilling met with a group of production employees at which time one of the employees asked him what was going to happen to the employees' performance evaluations and the employees' annual pay raises grant-

[4] Wilson's testimony was undenied and her testimonial demeanor was good.

[5] It is undisputed that on March 27 Dasher evaluated Thompson's job performance and at that time informed Thompson, that Thompson and the other employees in the department would be receiving a $20-a-week pay raise.

[6] The above description of what occurred is based on a composite of Tucker's and Thompson's testimony. Their testimony about this portion of the meeting was mutually consistent.

[7] Based on Tucker's testimony. Thompson testified that in response to his inquiry Tucker only stated: ''I'm sorry there is not anything we can do about that right now. We can't do anything that can be construed as influencing votes before the election.'' I credited Tucker's testimony because his testimonial demeanor, which was good, was better than Thompson's.

ed as the result of those evaluations? Drilling answered by stating that on the advice of the station's lawyer he was unable to continue the policy of evaluating employees for pay raises because it would give the appearance of trying to buy votes, but that when the lawyer advised him it was all right for the station to go ahead and reinstate the policy as it had been before, that the station would do so.[8]

In May, prior to the May 21–22 representation election, Station General Manager Drilling held a meeting with all the station's production employees. During this meeting one of the employees asked this question: ''If that policy that we had before with raises and reviews, if . . . the union, either coming in or not coming in, would effect that policy?'' Drilling answered by stating ''that that would not have an effect on us continuing with our evaluating process.'' And at a meeting with the station's news department employees in May, prior to the election, Drilling told those employees, ''that regardless of whether or not we had a union at KMST, that we would continue the evaluation process that we now have with evaluating the employees and their performance on the job.''

On July 14, one of the station's employees, Kelly Nigro, in the presence of two other employees, informed his supervisor, Production Manager Mark Walker, that he had been employed as a director for 6 months and asked when he would receive his review Walker replied that General Manager Drilling had ''frozen'' everything, that there was ''a wage freeze,'' so that Walker was not able to give any of the employees in his department ''any reviews or raises,'' and further explained that the ''lawyers'' had stated the station was not permitted to give any more pay raises.[9]

On July 18 Station General Manager Drilling met with all the station's employees. He informed them in substance that now that the union election was over that things should return to normal and that he did not want employees to harbor any ill will toward Respondent on account of what had occurred during the period preceding the election. When Drilling finished speaking, employee Thompson spoke up and informed him that in March his department head had told him he was to receive a pay raise, but that a week later he had been informed that employees would not receive their pay raises because pay raises could be construed as influencing votes. Thompson asked Drilling, ''now that the election is over, will we be getting our raises?'' Drilling replied by stating that there was nothing he could do about the employees' pay raises and offered the employees' the following explanation. He explained to them he had been advised by the station's attorney that to grant pay raises to the employees ''could give the appearance of us trying to illegally buy votes and illegally influence people in their decision process.'' He further explained that the Union and Respondent had ''appeals'' pending before the Board and until those ''legal issues'' were resolved there was nothing he could do about granting employees pay raises, and also advised the employees he was being sued in the instant case for not granting them their pay raises. Drilling concluded his answer by stating that once the Board ruled on the appeals pending before it, that he would have further discussions with the station's attorney and would follow the attorney's advice, and that once the attorney advised him ''it is now legal for [me] to do this, or it is not legal for [me] to do that,'' that Drilling would act on the matter of the employees' wage increases and evaluation, but Drilling stated he did not intend to do anything until he was advised by the attorney, and that he presently was unable to grant the employees' pay raises.[10]

The aforesaid description of Drilling's July 18 explanation to the employees for Respondent's failure to reinstate its policy of granting annual merit pay raises to its employees is based on Drilling's testimony. His testimony conflicts with the testimony of the General Counsel's witnesses, employees Thompson and Nigro. Thompson testified that in response to his question about the status of the employees' pay raises, Drilling replied he was unable to presently grant the pay raises and stated he was being sued because he had promised some of the employees pay raises and that he had been advised he could not be sued legally for not giving pay raises, so that for the time being there would be no raises. Thompson further testified that when he indicated he did not understand Drilling's answer to his question, that Drilling stated, ''presently I am being sued for having promised raises. And since I can't be sued for not promising raises, there will be no raises for the time being.''[11] Nigro gave a different description of Drilling's explanation. He testified Drilling simply stated that, ''at this point by law we cannot give out discretionary raises I've been told not to give out any discretionary raises.'' I credited Drilling's above-described testimony because his testimonial demeanor, which was good, was better than Thompson's and/or Nigro's.

II. DISCUSSION

The complaint alleges that ''commencing on or about March 27, 1989 Respondent ceased its customary practice of annually evaluating employees and granting employees annual wage increases based on such evaluations.'' It further alleges that by engaging in this conduct Respondent violated Section 8(a)(1) and (3) of the Act. The evidence pertinent to

[8] Based on Drilling's testimony. I considered the testimony of employee Ray Cleaveland that at an April 12 meeting of production employees, in response to an employee's question about the status of the employees' pay raises, Drilling replied, ''since we were going through a unionization process'' the wage increase would not be granted because of the way the increases might be perceived by union and by outside agencies or by ''outside people.'' During cross-examination Cleaveland gave a different account of Drilling's reply, now testifying that Drilling stated: ''I don't understand where these rumors keep coming from. There is no hiring freeze in effect. There is no pay freeze in effect. We cannot make any pay raises while the unionizing effort is going on, because of the way it would be perceived.'' I credited Drilling's above-described testimony, rather than Cleaveland's, because Drilling's testimonial demeanor, which was good, was better than Cleaveland's.

[9] Based on the undenied testimony of Nigro.

[10] I have considered that Drilling and Tucker, during a March telephone conversation with Respondent's attorney, were given advice on how to answer employees' questions about the station's decision to suspend the employees' annual merit wage increases, and were advised by the attorney to tell the employees, among other things, that ''once the election and legal review process is over, no matter what the outcome, whether or not the union ia certified by the Board the company will lift the temporary suspension and again start giving discretionary merit pay reviews in accordance with our past practice so that we can remain competitive in the market place.'' However, I have carefully reviewed Tucker's and Drilling's testimony concerning what they in fact stated to the employees on that subject and it is undisputed that neither of them made the above-quoted statement to the employees when they spoke to the employees.

[11] I note that when questioned about Drilling's answer to his question during the July 18 meeting, Thompson testified that although he had no difficulty remembering ''dates'' and ''numbers,'' he has ''trouble'' remembering ''conversations.''

an evaluation of these allegations has been described in detail supra and is briefly summarized as follows.

Respondent has a policy and practice of annually evaluating its employees' work performances for the purpose of granting them merit wage increases effective on or about their anniversary dates of employment. This policy had been in existence for several years prior to the Union's advent and pursuant to the policy between 85 and 90 percent of the employees received wage increases each year effective on or about their employment anniversary dates. Respondent's employees are aware of this policy and in 1989 expected to receive merit wage increases on or about their employment anniversary dates, if their work performances were satisfactory. However, after the Union on February 28 filed a representation petition with the Board seeking to represent Respondent's employees, in early March Respondent responded by suspending its aforesaid policy of granting its employees annual merit wage increases. As of the dates of the hearing in this case, August 23–24, Respondent had not resumed granting these wage increases even though the representation election had been held on May 21–22. During the period in which Respondent's policy of granting employees' annual merit wage increases has been suspended, a substantial number of employees would have been evaluated for merit wage increases during the normal course of business, and, as in the past, between 85 and 90 percent of those employees would have received merit pay raises, ranging from 3 to 10 percent, effective on or about their employment anniversary dates.

Respondent did not suspend its policy of granting employees annual merit wage increases because of economic reasons, i.e., inability to pay, but, according to the testimony of Executive Vice President Tucker, suspended the policy because Respondent's attorney recommended it be suspended because the pay raises could be construed as an attempt to buy the employees' votes in the representation election. Tucker testified Respondent's attorney stated, ''you've got to be very careful, because anything you do can be construed to be a movement to buy votes . . . and he said, the laws are very unclear on that.'' Tucker also testified that when Respondent is advised by its attorney that there are no longer any legal problems in resuming its policy of granting annual merit wage increases, that it will do so, but when it does resume granting the increases, Respondent does not know if those employees whose annual wage increases have been withheld due to the policy's suspension will be reimbursed retroactively to the dates they normally would have received their wage increases.

Prior to the May 21–22 representation election, Respondent gave the following explanations to employees for its failure to grant employees their annual merit wage increases. The head of the station's engineering department, Roy Dasher, during the first week of April told two of the employees in his department that they would not be receiving the wage increases he had recommended for them ''until the Union matter was settled'' and explained to the employees that because of the NLRB regulations the station could not do anything that could be construed as a bribe to encourage employees not to vote for the Union; Executive Vice President Tucker, on April 6, in response to an employee's inquiry about the status of the employees' wage increases, informed the station's production employees that because there was going to be an NLRB-conducted union representation election held in connection with the Union's organizational campaign that Respondent's attorney had advised him that Respondent could not grant the employees' pay raises because it might look like Respondent was trying to bribe them to get them to vote against union representation, and that as soon as Respondent was advised it could reinstate its policy of evaluating employees for merit pay raises it would do so, but before doing this, intended to wait ''until [it] had clearance and everything was taken care of''; General Manager Drilling, in April, told a group of production employees, in response to an inquiry about the status of the employees' merit wage increases, that the station's lawyer had advised him to discontinue the station's policy of evaluating employees for merit pay raises because the granting of such pay raises would give the appearance of trying to buy votes, and assured the employees that when the lawyer advised him it was all right to reinstate the policy that the station would reinstate it; General Manager Drilling, in May, prior to the representation election, at a meeting of the station's production employees, in response to an inquiry from one of the employees, stated that whether the Union came into the station as the employees' representative ''that that would not have an effect on us continuing with our evaluating process''; and in May, prior to the representation election, at a meeting of the station's news department employees, Drilling told the employees ''that regardless of whether or not we had a union at KMST, we would continue the evaluation process that we now have with evaluating the employees and their performance on the job.'' At no time prior to the election, or subsequent to the election, did Respondent's officials, either directly or by implication, advise the employees that when Respondent reinstated its policy of evaluating the employees for merit wage increases that employees who had not received a wage increase due to the suspension of the policy would receive their wage increases retroactively to their anniversary dates. Following the May 21–22 representation election, won by the Union, Respondent, which filed objections to the election, did not reinstate its policy of evaluating employees for the purpose of granting them their annual merit wage increases. It failed to do this even though it must have known that the Union did not object to the resumption of this policy and must have known that the Board's General Counsel did not consider such conduct to be a violation of the Act. Thus, the Regional Director's supplemental decision issued in the representation case reveals that one of Respondent's objections to the election was that the Union, as part of its campaign to persuade employees to vote for union representation, was critical of Respondent for failing to grant the employees their annual merit wage increases. Also the record reveals that by at least May 22 Respondent must have known that the Board's General Counsel, based on an unfair labor practice charge filed by the Union, had issued the complaint in the instant case alleging Respondent violated the Act by discontinuing its policy of granting employees their annual merit wage increases.

Following the May 21–22 representation election, Respondent offered the following explanations to its employees for Respondent's failure to resume granting them their annual merit wage increases: Early in July, when an employee asked when he would receive his ''review,'' Production Manager Walker replied that the ''lawyers'' had stated the station was not permitted to grant any more wage increases,

so, because of this ''wage freeze,'' Walker stated he was not able to give any of the employees in his department ''any reviews or raises''; and, on July 18 at a meeting of all the station's employees, General Manager Drilling, when asked whether the employees would be receiving their wage increases now that the election was over, replied by stating he had been advised by the Respondent's attorney that to grant wage increases ''could give the appearance of us trying to illegally buy votes and illegally influence people in their decision process'' and further explained that the Union and Respondent had ''appeals'' pending before the Board and that until those ''legal issues'' were resolved there was nothing Drilling could do about granting employees pay raises, and concluded by stating to the employees that once the Board ruled on the appeals pending before it, he would have further discussions with the station's lawyer and would follow the lawyer's advice, but he did not intend to do anything until he was advised by the lawyer and stated that presently he was not able to grant the employees pay raises.

Before I evaluate the aforesaid evidence, in the light of the applicable principles of law, I shall first briefly summarize the legal principles which govern the disposition of this case.

When an employer by promises or by a continuous course of conduct has made a particular benefit part of the employees' established wage or compensation system, then the withholding of that benefit during the pendency of a union representation election raises the inference of improper motivation. *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1128–1130 (9th Cir. 1978); *Plasticrafts, Inc. v. NLRB*, 586 F.2d 185, 187–190 (10th Cir. 1978); *Gossen Co. v. NLRB*, 719 F.2d 1354, 1356–1358 (7th Cir. 1983); *NLRB v. Don's Olney Foods*, 870 F.2d 1279, 1285 (7th Cir. 1989); *Southern Maryland Hospital Center v. NLRB*, 801 F.2d 666 (4th Cir. 1986). In determining whether an employer by promises or by a continuous course of conduct has made a particular benefit part of its ''established practice,'' besides focusing on the employees' reasonable expectations, it is also necessary to focus on what should have been readily apparent to the employer when the employer withdrew the benefit, for the employer is confronted with the dilemma of deciding whether his past promises or grants of benefits have created a clear status quo that must be maintained during the preelection period. In other words, the employer's conduct in withholding or suspending an employee benefit must be judged in the light of ''whether it would be clearly apparent to an objectively reasonable employer'' that the grant or denial of a benefit, at the time the action is taken, conforms to the status quo. *Plasticrafts, Inc*., supra, 586 F.2d at 188–189. Accord: *Gossen Co*., supra, 719 F.2d at 1357–1358; *Don's Olney Foods*, supra, 870 F.2d at 1285; *Southern Maryland Hospital Center*, supra; and *Free-Flow Packaging*, supra, 566 F.2d at 1129. And, when the status quo is clearly apparent and it can be said with assurance that the suspension of a wage increase, in response to the filing of a representation petition, constitutes a change from the status quo, then, as the court in *Plasticrafts, Inc*., supra, has ruled (586 F.2d at 188):

> [T]here need be no specific finding that the employer was prompted by anti-union motives. In such a case, the employer inevitably conveys the message that it, not the union, controls the purse strings. Employees will predictably consider that the union is somehow responsible for their failure to receive expected raises.

Accord: *Gossen Co*., supra, 719 F.2d at 1357–1358; *Don's Olney Foods*, supra, 870 F.2d at 1285; *Southern Maryland Hospital Center*, supra. In other words, where an employer's practice of granting employees pay raises should be clearly apparent to an objectively reasonable employer and the employer, in view of the pendency of a union representation election, suspends those wage increases, this conduct constitutes a violation of Section 8(a)(1) of the Act, even though the employer in suspending the increases may not have been motivated by antiunion sentiments.[12] This result is consistent with the reasoning of the Supreme Court in *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964), where the Court in upholding the Board's finding of a violation in an employer's grant of benefits during a union campaign, stated, ''[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged'' 375 U.S. at 409. The withholding of an established benefit of employment which is clearly a part of the employees' existing terns and conditions of employment conveys the same message more directly. And where, as here, this action is coupled with the employer's explanation to the employees that the reason for the withholding of the expected benefit is that a labor organization has filed a representation petition in connection with its campaign to organize the employees, it has the foreseeable effect of shifting the blame to the union, thereby interfering with employee free choice. See *NLRB v. Otis Hospital*, 545 F.2d 252, 254–255 (lst Cir. 1976); *Gates Rubber Co*., 182 NLRB 95–95 (1970).

However, the Board has held that an employer can avoid a violation in such a case if the employer at the time it suspends or discontinues the employees' expected benefit makes it clear to the employees that the only reason for its action is to avoid giving the appearance of trying to influence the outcome of the representation election and by informing the employees that the withheld benefit will be granted following the election and, in explaining this to the employees, does not place the onus for the postponement on the union. See *Uarco Inc*., 169 NLRB 1153, 1153–1154 (1968); *Heckethorn Mfg. Co*., 208 NLRB 302, 306, 1974); *Cutter Laboratories*, 221 NLRB 161, 167–169 (1975); *Sugardale Foods*, 221 NLRB 1228, 1228 (1975). In *Uarco*, *Heckethorn*, *Cutter*, and *Sugardale* the Board in effect ruled that this type of an explanation was sufficient to overcome or neutralize the foreseeable tendency of the withdrawal or suspension of expected wage increases to interfere with the employees' statutory right to support a union free from employer interference, even though in those cases it must have been clearly apparent to the employer, as well as the employees, that the sus-

[12] ''On the other hand,'' as the court in *Plasticrafts*, supra, stated (586 F.2d at 188–189):

> [W]hen there is no established practice with regard to wage increases, no inference automatically attaches in the mind of the employee to the giving or not giving of wage increases. In this situation it must be affirmatively shown that the employer was motivated by anti-union sentiments to establish a violation . . . . Since in such an ambiguous situation the employee is unlikely to draw a predictable conclusion from the employer's course of conduct.

Accord: *Southern Maryland Hospital Center*, supra.

pension or withdrawal of the employees' pay raises was in obvious derogation of the employees' existing terms and conditions of employment. But in *Village Thrift Store*, 272 NLRB 572 (1983), the Board adopted a different approach. There the Board indicated that in situations where, ''the benefits at issue have been provided *only in a 'haphazard fashion,'* the employer is faced with a Hobson's choice of granting the benefit with no objective evidence available to explain the timing, thereby risking allegations of unlawful interference with employees' Section 7 rights or, withholding the benefits and still being subject to charges of unlawful conduct,'' and stated that ''[t]he Board has resolved this dilemma by permitting employers to tell their employees that those benefits previously provided *in an indefinite manner* will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference.'' [Emphasis added.] 272 NLRB at 572–573. In so ruling, the Board in *Village Thrift* cited its previous decision in *Singer Co*., 199 NLRB 1195 (1972), which involved the suspension of benefits of employment which the Board found were not granted ''pursuant to any fixed practice, pattern, or preorganizational announcement, but the timing and eligibility of the benefits are purely within the discretion of the employer.'' 199 NLRB at 1196. See also *Pacific Southwest Airlines*, 201 NLRB 647 (1973), where the Board indicated that in cases involving ''the withholding of increased benefits, *the mechanics and resolution of which have not been finally formulated*'' that ''full explanation of the reasons for the withholding along with assurance of future consideration of the withheld benefits, notwithstanding the outcome of the union's election campaign, serve to dissipate any assumption that the employees may or may not have that the union's presence is the sole obstacle to the ultimate realization of the promised benefits.'' 201 NLRB at 647. [Emphasis added.]

It is my opinion that the rationale of the Board's decision in *Village Thrift* more accurately reflects the realities of the employer-employee relationship. Where it is clearly apparent to objectively reasonable employers, as well as employees, that a wage increase is an existing term and condition of employment regularly expected by the employees, it is unrealistic to give the employer a license to suspend or withdraw that wage increase just because the increase happens to be scheduled for a time period which coincides with the holding of a Board-conducted union representation election and the employer explains its actions to the employees in terms of not wanting to interfere with the outcome of the election and that it intends to grant the wage increase after the election regardless of the result. For these kinds of expected wage increases are not the kind that an employee will view as an attempt to buy his or her vote. Quite the opposite, employees view these kinds of wage increases as a part of their regular terms and conditions of employment and expect to receive them as scheduled. In view of this, when an employer informs its employees that this kind of an expected wage increase has been suspended because of the employer's fear that it would be construed as a bribe for the employees' votes, the employees will not believe this explanation. Rather, the employer's explanation, viewed in its context, will be seen as a pretext and because of its implausibility ''inevitably conveys the message [to the employees] that [the employer], not the union, controls the purse strings [and] employees will predictably consider that the union is somehow responsible for their failure to receive [the] expected raises.'' *Plasticrafts, Inc. v. NLRB*, 586 F.2d 185, 188 (10th Cir. 1978).

Respondent contends when in early March it stopped granting employees their annual merit wage increases because of the pendency of the Union's representation petition, it did not violate the Act because, when it engaged in this conduct, it was not motivated by antiunion animus, but acted in good faith on its legal counsel's advice that the granting of annual merit wage increases during the pendency of the Union's representation petition could be construed as an attempt to influence the outcome of the representation election, and that also acting on legal counsel's advice it neutralized any possible foreseeable tendency of its conduct to interfere with employees' statutory rights by explaining to the employees that the reason for the suspension of their merit wage increases was due to Respondent's desire to avoid the appearance of election interference and by assuring them that the increases would be granted when the matter involving the Union's representation petition was finally resolved. Respondent also argues that its lawyer's advice was sound advice because, in view of the ambiguous nature of the status quo, if it had granted the increases it would have been placed in the proverbial ''damned if you do, damned if you don't situation,'' and in view of this ambiguity would ''undoubtedly'' have been charged with the commission of an unfair labor practice if it had granted the merit wage increases while the election petition was still pending. I have considered Respondent's several arguments and find they lack merit for the reasons below.

Respondent's contention that it would undoubtedly have been subject to unfair labor practice charges if it had continued to grant annual merit pay increases during the pendency of the Union's representation petition and that it was, therefore, in a ''damned if you do, damned if you don't dilemma,'' has been convincingly answered by the court in *Plasticrafts*, supra, when it observed that ''there is nothing intrinsically unfair about either giving raises or not giving raises. Rather, '[t]he cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.''' 586 F.2d at 189 fn. 4, quoting, *NLRB v. Dothan Eagle, Inc*., 434 F.2d 93, 98 (5th Cir. 1970) (emphasis in original). Because, in the instant case, the Respondent for the past several years has had an established employment condition of annually evaluating its employees' performances on or about their employment anniversary dates and pursuant to those evaluations of granting the employees' merit wage increases effective on or about their anniversary dates of employment, Respondent could not have been found guilty of an unfair labor practice for maintaining that condition of employment. Therefore, there was no dilemma.

The fact Respondent retains discretion over whether merit wage increases will be granted to individual employees, depending on the outcome of each individual's performance evaluation, and the fact that the exact amount of the merit increase is not determined until the evaluation has been completed, does not render Respondent's evaluation and merit in-

crease program subjective and discretionary. For the Board, with courts' approval, has consistently held that merit wage increases based on employees' performance evaluations, identical to Respondent's merit increase program, are not subjective and discretionary *General Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 852, 854 (lst Cir. 1973); *Plasticrafts, Inc. v. NLRB*, 586 F.2d 185, 187, 189 (lOth Cir. 1978); *Gossen Co. v. NLRB*, 719 F.2d 1354, 1358 (7th Cir. 1981); *NLRB v. Don's Olney Foods*, 870 F.2d 1279, 1285 (7th Cir. 1989); and *Gupta Permold Corp*., 289 NLRB 1234 (1988). The Board and courts in the aforesaid cases concluded that simply because wage increases are called ''merit increases'' and are based on employers' evaluations of employees' work performances, that it did not mean they were the kind of wage increases employees would view as an attempt to buy their votes, if, as in those cases, they were based on well-established programs and had been granted in the past in or about a specified time frame and were tied to an ongoing evaluation of the employees' work, using facts known both to management and the evaluated employee as well as other employees. This is the situation involved in the instant case. Here, the record reveals that prior to the advent of the Union, Respondent had a long-established policy of granting its employees annual merit wage increases on or about their anniversary dates of employment[13] and that the employees were aware of this policy and had come to expect these increases and Respondent was aware of this. In view of these circumstances, I find that during the time material it would have been clearly apparent to an objectively reasonable employer that the granting of these merit wage increases constituted an existing form of compensation which was an integral part of the employees' current terms and conditions of employment and, as such, the granting of the merit increases would conform to the status quo.[14] It is for these reasons that I find without merit Respondent's contention that if it had granted the merit wage increases here it would have been placed in the proverbial ''damned if you do, damned if you don't situation'' and that in view of this ambiguity it would undoubtedly have been charged with the commission of an unfair labor practice if it had granted the merit increases while the election petition was still pending.

Freeflow Packaging Corp. v. NLRB, 566 F.2d 1124 (9th Cir. 1978), *J. J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981), *Singer Co*., 199 NLRB 1195 (1972), and *Heckethorn Mfg. Co*., 208 NLRB 302 (1974), cited by Respondent, are factually distinguishable from the instant situation. In *Freeflow Packaging*, the court found the withheld wage increase was not clearly an expected benefit, thus the court concluded that the employer had therefore made a good-faith effort to comply with the law. 566 F.2d at 1130. In *J. J. Newberry*, the court found the withheld wage increase was not clearly an expected employee benefit inasmuch as the employees were not aware of the employer's decision to grant the wage increase nor were the employees even aware of the employer's decision to withhold the increase. 645 F.2d at 152. In *Singer Co*., the Board concluded the withheld benefits were not ''expected benefits'' inasmuch as ''the benefits are not pursuant to any fixed practice, pattern or preorganizational announcement, but both the timing and eligibility for the benefits are purely within the discretion of the employer.'' 199 NLRB at 1196. And, in *Heckethorn Mfg*. it was unclear from the employer's past practice of granting the general pay raise involved, whether the employer would have granted the raise during the time frame preceding the scheduled representation election, thus it was not clearly apparent to either the employer or the employees that the grant of the general wage increase during the pendency of the representation election would have been consistent with the status quo. 208 NLRB at 306 fn. 11.[15] Here, unlike the aforesaid cases cited by Respondent, as I have found supra, it was clearly apparent to all those involved—Respondent, employees and Union—that Respondent's grant of merit wage increases during the pendency of the Union's representation petition would have been perfectly consistent with the status quo.

Likewise without merit is Respondent's further contention that its conduct here did not violate the Act because there is no showing it was motivated by antiunion animus, but that the record shows it acted in good faith on legal counsel's advice that granting the employees their annual merit wage increases during the pendency of the Union's representation petition could be construed as an attempt by Respondent to influence the outcome of the election. Given the Respondent's clearly established practice of granting employees annual merit wage increases on or about their employment anniversary dates, so as to make those increases part of the employees existing terms and conditions of employment, and where, as here, Respondent's withholding of the merit wage increases was coupled with Respondent's explanation to the employees that the reason for the withholding of this expected benefit of employment was that the Union had filed a representation petition in connection with its campaign to organize the employees, it had the foreseeable effect of shifting the blame for the withdrawal of the expected wage increases to the Union, thereby interfering with employee free choice. In view of these circumstances, assuming there is insufficient evidence to establish that Respondent's conduct was motivated by antiunion animus, it is no defense.[16] *Plasticrafts, Inc. v. NLRB*, supra, 586 F.2d at 188–190; *NLRB v. Don's Olney Foods*, supra, 870 F.2d at 1285; *Gossen Co. v. NLRB*, supra, 719 F.2d at 1357–1358; and *Southern Maryland Hospital Center v. NLRB*, supra. Nor is Respondent's position strengthened by its asserted reliance on the erroneous advice of its attorney, for it is settled that

[13] In evaluating an employee's work performance to determine whether the employee qualifies for a wage increase, the department head uses a standard employee evaluation form and the employee is shown the form after it has been filled out by the department head at which time the employee and department head discuss the evaluation and thereafter discuss the amount of the wage increase granted.

[14] I note there is no evidence that Respondent's conduct here was attributable to its misapprehension of whether there was an established merit wage increase practice in effect for its employees. Rather it received and acted on advice that giving merit wage increases during the pendency of a union representation petition might itself be found the basis for an unfair labor practice. (Tr. 188, LL. 4–15 and Tr. 189, LL. 3–15.)

[15] I also note that in *Heckethorn*, unlike the instant case, immediately after the representation election the employer granted the withheld wage increase and granted it retroactively. 208 NLRB at 306.

[16] Respondent cites *J. J. Newberry Co. v. NLRB*, 442 F.2d 897 (2d Cir. 1971), and its progeny in support of this position. The *Newberry* case, however, is not in accord with the Board's and the Tenth Circuit's view of an employer's obligation in circumstances such as these, and the Board and Tenth Circuit have noted their disagreement with the holding of that case. *Plasticrafts, Inc*., 234 NLRB 762 fn. 1 (1978), enfd. 586 F.2d 185, 189 (10th Cir. 1978).

legal advice is not ''conclusive evidence of a proper motive'' *GAF Corp. v. NLRB*, 488 F.2d 306, 309 fn. 10 (2d Cir. 1973); *NLRB v. Hendel Mfg., Inc*., 483 F.2d 350, 353 (2d Cir. 1973). In any event, where, as here, an action is inherently coercive, it is not excused by good faith. *Federation of Union Representatives v. NLRB*, 339 F.2d 126, 129–130 (2d Cir. 1964). In short, the Act does not prohibit ''only intentional interferences by an employer with his employees' freedom of association.'' *Hendel Mfg. Co*., supra, 483 F.2d at 353. The ''fact that Respondent's decision was undertaken as a result of legal advice, of course, does not absolve the Respondent from the responsibility for the course of action undertaken, if in fact it is unlawful.'' *Great Atlantic & Pacific Tea Co*., 166 NLRB 27, 28 (1966).

Having found that by not granting employees their expected annual merit wage increases because the Union had filed a representation petition, Respondent foreseeably placed the employees in the position of assuming and inferring that the Union was responsible for the withholding of expected merit wage increases, the question remaining is whether Respondent neutralized the foreseeable tendency of its conduct to interfere with the employees' statutory rights. Respondent argues it did so by subsequently explaining to the employees that the reason it did not grant them their expected merit wage increases was to avoid the appearance of election interference and by assuring the employees the increases would ultimately be granted, regardless of who won the representation election. I am of the opinion, for the reasons below, that Respondent's explanation to the employees was insufficient to neutralize the foreseeable adverse effect of its conduct on the employees' statutory right to support the Union.

First, Respondent did not assure the employees that when it eventually got around to reinstating its policy of granting employees annual merit wage increases, that the employees who had not received their increases as scheduled would receive their retroactively to their employment anniversary dates. Respondent's failure to assure the employees of this was a significant omission because the employees will suffer a financial loss if the withheld merit wage increases are not reinstated retroactively. It is clear that the employees whose merit wage increases have been withheld and those who had reason to fear that their expected raises would be withheld before Respondent got around to reinstating its policy, would not have been reassured merely by Respondent's explanation that at some indefinite time in the future Respondent intended to reinstate its policy of granting the annual merit wage increases. As far as the employees were concerned, absent an assurance that the expected merit wage increases would be eventually reinstated retroactively to the employees' anniversary dates, the employees would suffer a financial loss on account of the Union having filed a representation petition as part of its campaign to organize them. Thus, the inevitable effect of Respondent's failure to assure the employees that their withheld merit wage increases would be eventually granted retroactively was to reinforce the employees' initial understanding that they were being penalized because the Union, as part of its organizational campaign, had filed a representation petition seeking to represent them.

Second, when Respondent explained to the employees that it intended to eventually reinstate its policy of granting employees annual merit wage increases, Respondent was vague and evasive about when it intended to reinstate the policy. Rather than simply tell the employees it intended to reinstate their annual merit wage increases after the election, Executive Vice President Tucker informed the employees that Respondent would reinstate its program of granting merit wage increases only when it received ''clearance'' from its lawyer and ''everything was taken care of.'' The lack of assurance as to exactly when Respondent intended to resume granting employees their expected annual merit wage increases, when coupled with Respondent's failure to assure the employees that those merit increases which were withheld would be reinstated retroactively, was further calculated to reinforce the employees' initial understanding that they were being penalized because the Union, as part of its organizational campaign, had filed a petition seeking to represent them.

Third, Respondent did not reinstate the employees' expected merit wage increases even after the representation election. As described in detail supra, General Manager Drilling on July 18 notified the employees that even though the election had been held 2 months previously, Respondent did not intend to grant them their expected merit wage increases until two things occurred the ''legal issues'' posed by the ''appeals'' of the Union and Respondent were resolved, and Respondent's lawyer advised management it was appropriate to pay the merit wage increases. Clearly, this explanation was reasonably calculated to give employees the impression that even though the representation election had been held 2 months previously, they would still not be receiving their annual merit wage increases for an indefinite period of time. But even more significant is Drilling's failure to explain to the employees the connection between the resolution of the ''legal issues'' posed by the parties' ''appeals,'' and Respondent's alleged fear that reinstating its program of annual merit wage increases would interfere with the representation election which had been held 2 months previously.[17] In view of these circumstances, Respondent's failure to reinstate its policy of granting employees their annual merit wage increases, even after the representation had been held, was foreseeably and inevitably calculated to lead the employees to believe they were being penalized by Respondent because the Union, as part of its organizational campaign, had filed a representation petition and because a majority of the employees had voted in the representation election in favor of union representation.

Fourth, following the May 21–22 election Respondent did not grant the expected merit wage increases to the employees whose increases had been withheld by Respondent because of the scheduled representation election and did not reinstate its policy of granting employees their annual merit wage in-

[17] I note that Drilling's reference to the Union's ''appeal'' must have been a reference to the instant case inasmuch as the Union, which won the representation election and was certified on July 13 by the Board's Regional Director as the employees' exclusive collective-bargaining representative, filed no appeal (request for review) in the representation case. Because the Union had won the representation election and at the time of Drilling's above explanation to the employees had been certified by the Board's Regional Director, it is a fair inference that the employees understood Drilling's mention of the Union's ''appeal'' to refer to the Union's unfair labor practice charge in the instant case which resulted in the complaint charging Respondent with violating the Act by refusing to grant the employees their annual merit wage increases. Therefore, this aspect of Drilling's explanation to the employees was further calculated to lead them to believe that the merit wage increases were still being withheld in order to penalize them on account of the Union's actions and because a majority of them had voted in favor of union representation.

creases. It acted in this manner even though it was abundantly clear by this time, both to the employees and the Respondent, that the Union did not object to Respondent reinstating its policy of granting employees their annual merit wage increases and that the Board's General Counsel did not consider such conduct to be an unfair labor practice.[18] In view of these circumstances, Respondent's failure to grant the employees their annual merit wage increases, even after the election, was foreseeably and inevitably calculated to lead the employees to believe they were being penalized by Respondent because the Union, as part of its organizational campaign, had filed its representation petition and because a majority of the employees had voted in the representation election in favor of union representation.

It is for all the above reasons—the failure of Respondent to assure the employees that when it eventually resumed granting the employees their expected annual merit wage increases that it would do so retroactively; the vagueness and ambiguousness of Respondent's statements to the employees explaining when it intended to resume granting the employees their expected annual merit wage increases; the failure of Respondent to grant the employees their expected annual merit wage increases even after the representation election and even after it became abundantly clear to Respondent and the employees that the Union did not object to Respondent granting the employees their annual merit wage increases and that the Board's General Counsel did not consider such conduct to be an unfair labor practice—that I find Respondent's subsequent explanations to the employees for its failure to pay them their expected annual merit wage increases due to the pendency of the Union's representative petition, did not neutralize the foreseeable and inevitable effect of Respondent's conduct, which was to place the employees in the position of assuming and inferring that the Union was responsible for their failure to receive their expected annual merit wage increases.[19] In any event, as I have discussed supra, where, as here, it was clearly apparent to the Respondent, as well as the employees, that the withdrawal of the employees' merit wage increases was done in obvious derogation of the employees' existing terms and conditions of employment, it is my opinion that Respondent violated Section 8(a)(1) of the Act when it withheld the employees' expected merit wage increases, even though it explained to them that its sole reason for withholding the increases was to avoid the appearance of influencing the election and that the increases would be granted ultimately regardless of the outcome of the election *Village Thrift Store*, 272 NLRB 572–573 (1983).

In summation considering that commencing early in March 1989 and continuing thereafter, Respondent ceased its customary practice and policy of annually evaluating its employees' work performances and in conjunction with those evaluations annually granting its employees merit wage increases on or about their anniversary dates of employment; considering that this policy had existed for several years before the advent of the Union and the employees were aware of it and had come to expect their annual merit wage increases and that Respondent was aware of this; considering that when Respondent during the time material withheld the employees' annual merit wage increases, that it would have been clearly apparent to an objectively reasonable employer that the granting of the employees' annual merit wage increases constituted an existing form of compensation which was an integral part of the employees' existing terms and conditions of employment, and, as such, that the granting of the increases would conform to the status quo; considering that given Respondent's clearly established practice of granting these increases and given that Respondent informed the employees that it was withholding those increases because the Union, in connection with its organizational campaign had filed a representation petition, the employees would foreseeably be placed in the position of assuming and inferring that the Union's effort to organize the employees, i.e., the filing of the representation petition, was responsible for the Respondent's withholding of the employees' expected annual merit wage increases; and, considering that Respondent's subsequent statements to the employees' explaining why it had withheld their expected merit wage increases, not only failed to neutralize the foreseeable tendency of its conduct to interfere with the employees' statutory right to support the Union, but were reasonably calculated to reinforce the impression in the minds of the employees that the expected increases had been initially withheld because the Union had filed a representation petition in connection with its organizational campaign and had continued to be withheld even after the election so as to penalize the employees for having voted in favor of Union representation; I find that these considerations, in their totality, establish that Respondent violated Section 8(a)(1) of the Act when, early in March 1989 and continuing thereafter, it ceased its customary practice and policy of annually evaluating its employees' work performances and in conjunction with those evaluations annually granting its employees merit wage increases on or about their anniversary dates of employment.[20]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[18] As found supra, one of Respondent's objections to the election was the Union during its preelection campaign, in attempting to persuade employees to vote for union representation, had been critical of Respondent for failing to grant the employees their annual merit wage increases. Also, as found supra, by at least May 22 Respondent and the employees knew that the Board's General Counsel, based on the Union's unfair labor practice charge, had issued the complaint in this case alleging Respondent violated the Act by discontinuing its policy of granting employees their annual merit wage increases.

[19] *Cutter Laboratories*, 221 NLRB 161 (1975), and *Uarco, Inc*., 169 NLRB 1153 (1968), relied on by Respondent, and *Sugardale Foods*, 221 NLRB 1228 (1975), not relied on by Respondent, are factually distinguishable In *Cutter Laboratories* the employer specifically assured the employees that regardless of the outcome of the election that their expected wage increase would be granted retroactively to the date it had been due, and immediately after the election the employer, as promised, granted the wage increase retroactively to the date on which it was originally scheduled 221 NLRB at 167–169. In *Sugardale Foods*, the employer informed the employees that their expected wage increases ''were being deferred until the election so that the employer would not be accused of trying to influence their votes,'' and after the election the employees were promptly granted their expected wage increases retroactively to their respective employment anniversary dates. 221 NLRB at 1228. In *Uarco* after the election the employer promptly granted the employees their wage increases retroactively even though the Union, which lost the election, had filed objections to the election; one of the objections was that the employer had withheld the employees' pay raises. 169 NLRB at 1153–1154.

[20] I have not decided whether Respondent by engaging in the above-described conduct also violated Sec. 8(a)(3), as alleged in the complaint, inasmuch as such a finding would not materially alter the remedial order in this case.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By ceasing in early March 1989 to evaluate its employees' work performances and by also at the same time ceasing to grant its employees their annual merit wage increases pursuant to those evaluations, I find Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act by suspending its policy of annually evaluating its employees' work performances and as a result of those evaluations granting its employees annual merit wage increases, I shall recommend that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act, including the recommendation that Respondent immediately reinstate and implement the aforesaid policy of annually evaluating its employees' work performances and granting them merit wage increases, and to make whole all of its employees for any loss of earnings they may have suffered as a result of the unlawful withholding of their annual, merit wage increases. The exact sums owing, with interest, shall be determined in the compliance stage of this proceeding.

[Recommended Order omitted from publication.]